91-238

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

Ernest E. Riggs, Petitioner

v.

Scrivner, Inc., an Oklahoma corporation, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the jury's decision as to both damages and liability, regarding Petitioner's 42 U.S.C. 1981 cause of action may be considered final and appealable, although Petitioner has a 42 U.S.C. 2000e causes of action in the same case, which had not been fully decided.

2. Whether the trial court's sua sponte order for a new trial regarding Petitioner's 1981 cause of action was timely entered and proper under the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

TABLE OF AUTHORITY

Cases:

Statutes and rules:

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OPINION BELOW

The Opinion of the Tenth Circuit court of appeals (Pet. App A) and the Order of the District Court (Pet App. B) are not published.

JURISDICTIONAL STATEMENT

Petitioner comes before this Court on Writ of Certiorari (postmarked on June 11, 1991) pursuant to Rule 10 (a) of the Rules of the Supreme Court, seeking

review of the Tenth Circuit Court's decision entered on March 13, 1991, upholding the trial court's granting of a new trial on February 7, 1989, on Petitioner's 1981 cause of action. Petitioner maintains that the trial court's sua sponte ruling was untimely entered and substantially departs from the accepted and usual course of judicial proceedings, and that the Tenth Circuit Court's ruling improperly sanctioned the lower trial court's departure. The jurisdiction of this Court is granted by 28 U.S.C. 1254(1)

RELEVANT STATUTES AND RULES

42 U.S.C. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full

and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2000e-2 (a)(1)

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Rule 59(d) of the Federal Rules of Civil Procedure

Not later than 10 days after entry of

judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

STATEMENT OF CASE

Petitioner commenced this action in November 1987 pursuant to 42 U.S.C. Section 1981 and Title VII, 42 U.S.C. Section 2000e, alleging Respondent wrongfully terminated Petitioner's employment on the basis of his race, white (Caucasian).

Following a jury trial on Petitioner's 1981 claim, the jury, on June 2, 1988, returned a verdict in favor of Petitioner

on said claim. Also on June 2, the trial court, addressing the Title VII claim, made an initial determination in favor of Respondent.

On June 10, Respondent filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial, challenging the jury verdict on the Section 1981 claim. The district court denied that motion on September 1, 1988, and also reversed its initial determination in Respondent's favor on the Title VII claim, and held in favor of Petitioner because it was bound by the jury's 1981 determination regarding liability, the ultimate question of discrimination. The trial court then set a hearing on the issue of Title VII relief. On September 21, 1988, a hearing was held to determine attorney fees, and on October 4, 1988, it was ordered that

Petitioner was entitled to reasonable attorney fees.

Respondent filed a notice of appeal on September 27, 1988, challenging the district court's September 1, 1988, denial of its motion for new trial or judgment JNOV. On December 7, 1988, Respondent further filed a motion for reconsideration of the denial of its motion for new trial, asserting for the first time that the jury verdict on the Section 1981 claim was the result of a jury compromise. On February 7, 1989, the district court denied the motion to reconsider, but sua sponte ordered a new trial, after concluding the jury verdict was the result of a compromise.

The district court conducted a second jury trial, which resulted in a verdict in favor of Respondent on the Section 1981 claim. The trial court then held in

Respondent's favor on the Title VII claim and awarded Respondent costs.

Petitioner appealed to the Tenth Circuit Court of Appeals; and the Tenth Circuit Court affirmed the decision of the trial court. Petitioner submits this writ of certiorari seeking a ruling from this Court reversing the decision of the 10th Circuit Court and holding that the trial court improperly ordered a new trial on Petitioner's 1981 claim as its sua sponte order granting a new trial was not timely entered. Moreover, Respondent's filing of Notice of Appeal divested the trial court of any jurisdiction it might have had to grant a new trial.

ARGUMENTS

I.

THE JURY'S DECISION ON THE PETITIONER'S 1981 CAUSE OF ACTION AND THE TRIAL COURT'S SUBSEQUENT DENIAL OF A RESPONDENT'S MOTION FOR JUDGMENT JNOV WAS A FINAL AND APPEALABLE DECISION

Petitioner's case contained two separate and distinct causes of action; one under Title VII 42 U.S.C. 2000e and the other under 42 U.S.C. 1981. A jury trial was had on Petitioner's 1981 cause of action, and a verdict was given in Petitioner's favor. Respondent then filed a motion for a new trial or in the alternative judgment JNOV which was denied. At that point the decision regarding Petitioner's 1981 cause of action became final and appealable.

Since 1856, this Court has stated that a decision is final when it disposes of the whole subject, gives all the relief contemplated and leaves nothing to be done. Beebe v. Russell, 60 U.S. 283, 285, 50 LEd 668 (1856) That is exactly what happened with regard to Petitioner's 1981 claim. A jury trial was conducted; liability was determined; damages were awarded and there was nothing remaining to be done regarding Petitioner's cause of action under 42 U.S.C. 1981. The jury decision regarding the same was, therefore, final and appealable.

Oklahoma law states that when several cognate matters are litigated in the framework of one case, there may be several successive final and appealable orders, although the law contemplates but one judgment that disposes of the main action. Ray E. Stubblefield v. General

Motors Acceptance Corporation, 619 P.2d 620, 624 ((Okl. 1980) citing State ex rel Board of Affairs v Neff, 205 Okl. 205, 236 P.2d 681, 683 (1951)). Other states have also held that where there are multiple claims in a single law suit, the disposition of one or more but fewer than all of those claims can be considered final and appealable. Daniels v. McKay Machine Co., 607 F.2d 771, 773 (CA Ill 1979).

The point here is that where an independent cause of action has been completely decided, the decision therein should be considered final and appealable. The fact that there may be additional causes of action contained in the same suit should have no bearing on the appealability of the particular cause of action that has been decided. Certainly, there would be no question of

the finality and appealability of Petitioner's 1981 action if it were not accompanied by Petitioner's second cause of action under 42 U.S.C. 2000e. The term "final decision" does not necessarily mean the last order possible to be made in a case. Eisen v. Carlisle and Jacqueline, 370 F.2d 119, 120 (2nd Cir. 1966). The most important considerations are the inconvenience and costs of piecemeal review on one hand and denying justice by delay on the other hand. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-153, 85 Sct. 308, 13 LEd.2d 199 (1964).

That Petitioner's 1981 cause of action was decided in a separate jury trial shows clearly that it was considered and treated as a separate and independent cause of action. All matters were concluded concerning said cause of action

and any decision rendered in Petitioner's Title VII claim can have no effect on what was already decided by the jury concerning Petitioner's 1981 claim.

II.

THE TRIAL COURT'S GRANTING OF A NEW TRIAL SUA SPONTE WAS NOT TIMELY ACCORDING TO RULE 59 (d) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The trial court ordered a new trial concerning Petitioner's 1981 cause of action because it concluded the jury verdict was a compromise verdict. It is not clear what made the trial court come to this conclusion, but in any event, it had ten (10) days after said verdict became final to order a new trial on its own initiative. Rule 59 (d) states:

> Not later than 10 days after

> entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor. (Emphasis added).

The jury's verdict became final when the trial court first denied Respondent's Motion for Judgment JNOV. The trial court ordered a new trial in the instant case more than five (5) months after it denied Respondent's motion. Moreover Respondent's Motion to reconsider the denial of its Motion JNOV was completely out of time and inappropriate. If this court accepts the proposition that the jury verdict regarding Petitioner's 1981 claim was both final and appealable, it must also conclude that the trial court's

order for a new trial regarding the same was not timely.

The lower court, stated that no judgment had been entered and therefore the ten (10) day time limit set by Rule 59(d) was never triggered. The mere fact that the trial court failed to enter the judgment is inconsequential. The record shows that no objection was made to this failure and the parties treated the jury's verdict as a final judgment. Respondent filed a notice of appeal regarding said verdict and the court ruled that Petitioner was entitled to reasonable attorney fees. The technical requirement that a separate document be filed is, therefore, waived. Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 N.1 (11th Cir. 1983).

The requirements of finality should be given a practical rather than a technical

construction Fox v. City of West Palm Beach, 383 F.2d 189, 193 (5th Cir. 1967) For all practical purposes, the judgment rendered regarding Petitioner's 1981 claim was both final and appealable.

III.

NOTWITHSTANDING THE FACT THAT THE TRIAL COURT ENTERED ITS SUA SPONTE ORDER FOR NEW TRIAL OUT OF TIME, RESPONDENT'S PRIOR FILING OF ITS NOTICE OF APPEAL DIVESTED THE COURT OF JURISDICTION

It is well settled law that the filing of a timely notice of appeal divest the district court of jurisdiction, e..g., Garcia v. Burlington Northern R.R. Co., 818 F.2d 713, 712 (10th Cir. 1987) Respondent filed its notice of appeal regarding the trial court's denial of its Motion for judgment JNOV on September 27, 1988 over four months before the Court,

sua sponte, ordered a new trial. The record is clear that, beginning September 27, 1988, the trial court had no jurisdiction to order a new trial or do anything else regarding the jury verdict in Petitioner's favor. Therefore, any action taken by the trial court past that point is null and void.

IV.

THE TRIAL COURT'S DECISION IN RESPONDENT'S FAVOR REGARDING PETITIONER'S TITLE VII 42 U.S.C. 2000e CLAIM SHOULD BE REVERSED BECAUSE IT DOES NOT COMPLY WITH THE ORIGINAL JURY VERDICT REGARDING PETITIONER'S 1981 CLAIM

If this court should find that the initial jury determination in Petitioner's favor should be upheld, then it must also find that liability under 42

U.S.C. 2000e must be held in Petitioner favor. This is true because the question of discrimination would already be decided by the 1981 verdict. The only question left for determination would be damages under 42 U.S.C. 2000e.

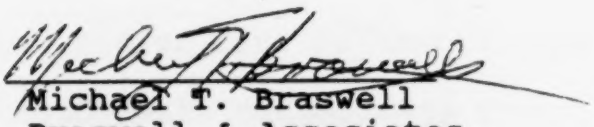
CONCLUSION

The jury decision regarding Petitioner's 1981 claim was final in every respect. The trial court and Respondent treated it as such. The trial court's order for a new trial, more than five (5) months after its denial of Respondent's Motion for Judgment JNOV, was completely untimely and improper. In any event, the Respondent's filing of its notice of appeal divested the trial court of any jurisdiction to order a new trial.

Wherefore, Petitioner prays that this Court reverse the Tenth Circuit Court's opinion, and reinstate the district

court's judgments entered on September 1, 1988 Petitioner further prays that this court remand the instant case back to the trial court for the purpose of determining damages under 42 U.S.C. 2000e.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1991, three (3) correct copies of the foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

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Michael T. Braswell

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AFFIDAVIT OF MAILING

This Petitioner's Appendix was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on August 7th, 1991, from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

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STATE OF OKLAHOMA,)
) SS.
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 7th day of August, 1991.

Barbara Braswell
Notary Public

My Commission Expires 10-19-93.